STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VERNON MICHAEL STATON,

Defendant-Appellant.

UNPUBLISHED
February 18, 2003

No. 236380
St. Clair Circuit Court
LC No. 00-002610-FC

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(a) (victim under 13), and one count of second-degree criminal sexual conduct (CSC II"), MCL 750.520c(1)(a) (victim under 13). Defendant was sentenced as an habitual offender (fourth or subsequent offense), MCL 769.12, to concurrent prison terms of 15 to 35 years for the CSC I conviction, and 10 to 35 years for the CSC II conviction. Defendant appeals as of right. We affirm, but remand for the ministerial task of correcting the judgment of sentence.

I. Facts

This case arose when the complaining witness' mother discovered an entry in the complainant's diary indicating that the complainant, then twelve years old, had engaged in sexual conduct with defendant, then aged twenty-three.

On the night of July 30, 2000, the complainant had her mother's permission to spend the night with a slightly older female friend, but the two youngsters took the liberty of visiting defendant and others, at the home where defendant lived with his mother, for the majority of the night. According to the complainant, defendant escorted her to the kitchen and kissed her on the lips, after which the two returned to defendant's bedroom, and sat or lay on his bed. The complainant testified that defendant then suspended a sheet so as to create a barrier between them and others in the room, continued to kiss her, and repeatedly asked if he could "finger" her. The complainant described defendant unbuttoning her shirt, feeling her breasts with his hands, then loosening her pants and "fingering" her "private area," elaborating that defendant put his finger inside her vagina.

II. Rape Shield Statute

Defendant argues that the trial court erred in construing the rape-shield statute to bar evidence that the complaining witness engaged in consensual sexual contact with a person other than defendant on the night in question. We disagree.

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, statutory interpretation presents a question of law, calling for review de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). The rape-shield statute reads, in pertinent part, as follows:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MCL 750.520j(1).]

Similarly, MRE 404(a)(3) limits the introduction of evidence of a CSC complainant's sexual history to "evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

"The rape-shield statute was aimed at thwarting the then-existing practice of impeaching the complainant's testimony with evidence of the complainant's prior consensual sexual activity, which discouraged victims from testifying 'because they kn[e]w their private lives [would] be cross-examined.'" *People v Adair*, 452 Mich 473, 480-481; 550 NW2d 505 (1996), quoting House Legislative Analysis, SB 1207, July 18, 1974 (bracketed material in original). "A complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant," and "a witness' sexual history is usually irrelevant as impeachment evidence because it has no bearing on character for truthfulness." *Adair, supra* at 481, citing MRE 401 and 608. Thus, the statute codifies the trend in the law toward recognizing the *de minimis* relevance of a complainant's actions with third persons regarding the issues of consent and credibility.

A criminal defendant has a constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984), citing US Const, Ams VI and XIV, and Const 1963, art 1, §§ 13, 17, 20. This includes the right to confront adverse witnesses. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). Statutes should be read, where possible, so as to ensure their constitutionality. See *Kopietz v Clarkston Zoning Bd of Appeals*, 211 Mich App 666, 676; 535 NW2d 910 (1995). Accordingly, the rape-shield statute must be applied so as to comport with the constitutional right of confrontation. *Hackett, supra* at 347-350. For such purposes, our Supreme Court "has made it clear that application of the rape-shield statute must be done on a

case-by-case basis, and that the balancing between the rights of the victim and the defendant must be weighed anew in each case." *People v Morse*, 231 Mich App 424, 433; 586 NW2d 555 (1998), citing *Adair, supra*; *Hackett, supra*.

This case does not involve the defense of consent, in that neither the complainant's consent to sexual activity in fact, nor her incapacity to give it by law because of her youthful age, are in dispute. Instead, the question is whether the rape-shield statute bars a defendant from bringing evidence of the complainant's sexual activity with another person for the purpose of asserting the defense of mistaken identity.

MCL 750.520j(2) calls for an *in camera* evidentiary hearing to decide the admissibility of evidence of a defendant's sexual conduct with the complainant or third persons for the purposes specifically described in MCL 750.520j(1)(a) and (b). Our Supreme Court has prescribed the same procedure for purposes of evaluating offers of proof where a defendant asserts a constitutional right to introduce evidence of a complainant's sexual history for reasons other than those set forth in the statute. *Hackett, supra* at 349-351.

In this case, defense counsel sought to introduce a police statement from a fourteen-year-old boy ("the boy"), in which he admitted engaging in sexual relations with the complainant similar to what she alleged against defendant, and in the course of the same night, for purposes of showing that the complainant "pointed her finger in the wrong direction." Defense counsel cited interview notes taken by a police investigator, which included the following:

> [The boy] . . . advised that he was the one who touched [the complainant] both on her breasts and vaginal area. [The boy] stated this was both over and under [the complainant's] clothes and that [the complainant] just kissed him while he was doing this to her. [The boy] stated that she never attempted to stop him and she did not touch him. [The boy] stated their clothes was [sic] kept on and nothing was removed. [The boy] was asked if [defendant] did anything to [the complainant] and stated no he did not. [The boy] was asked if he was in the room when [defendant] and [the complainant] was [sic] on the bed and stated he was not.

After hearing the complainant's trial testimony on direct examination, the trial court ruled as follows:

> This is exactly the purpose of the Rape Shield Statute that I'm acquainted with, to present this sort of testimony . . . . And I determine that it's not necessary to have an in camera or otherwise testimony from [the boy]. I've heard enough from the witnesses that have testified so far to convince me that I will not permit the testimony . . . to be given by [the boy].

We agree with the trial court. The boy indicated that he engaged in sexual conduct with the complainant, but he could not account for the complainant's time with defendant in the latter's bedroom. This account did not contradict the prosecutor's theory of the case. Further, the complainant's own testimony plainly implicating defendant as one who took sexual liberties with her and denying that she was heavily intoxicated on the night in question, suggested that any theory of mistaken identity in the matter was a strained one, and the evidentiary value of the

boy's testimony hardly outweighed the policy concerns behind the rape-shield statute. For these reasons, we reject this claim of error.

III. Impeachment Evidence

Defendant argues that the trial court abused its discretion in denying a defense motion to suppress his two earlier convictions for breaking and entering a motor vehicle, which the prosecutor used, along with other convictions of crimes involving theft, to impeach defendant at trial. We disagree.

Although theft crimes do not seem to bear directly on questions of credibility, they do rationally implicate the perpetrator's trustworthiness. For that reason, and because the rules of evidence plainly recognize the potential for a history of theft crimes to assist a trier of fact in assessing credibility, MRE 609, we do not find persuasive defendant's general policy arguments against using theft crimes in credibility determinations.

Defendant points out that MRE 609(a)(2) recognizes theft crimes as potentially, not necessarily, admissible for purposes of challenging credibility. We do not take issue with defendant's observation, but note that defendant never suggests that the trial court failed to appreciate that it was a matter left to its discretion.

Defendant also notes that his earlier theft convictions were five or six years old, and argues that the resulting "staleness" reduced their probative value concerning truthfulness. However, if the aging of a conviction renders it less probative of honesty, so logically must aging render a conviction less potentially prejudicial as a stain on a defendant's general character. Because this argument works both against him and in favor of him, defendant fails to show prejudice. Further, because MRE 609(c) provides a ten-year demarcation line, younger convictions are presumptively valid for the purposes articulated in the rule.

Finally, the trial court instructed the jurors to consider the evidence of defendant's prior convictions only insofar as it bore on their determination of defendant's credibility, specifically adding that a "past conviction is not evidence that the Defendant committed the alleged crimes in this case." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, we find that the trial court did not abuse its discretion in admitting defendant's prior theft convictions for use as impeachment evidence.

IV. Prosecutorial Misconduct

Defendant argues that the prosecutor engaged in misconduct by implying, through statements and repeated questioning, that defendant had tried to persuade the witnesses to testify falsely for his benefit, where there was in fact no evidence linking defendant to any such intrigues.

Defendant preserved review of some instances by objecting, others he did not. Concerning preserved issues of prosecutorial misconduct, this Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). However, "[a]bsent an

objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (unpreserved issues are reviewed for plain error affecting substantial rights).

"[E]vidence of a defendant's subsequent efforts to influence or coerce the witnesses against him is admissible where such activity demonstrates a consciousness of guilt on the part of the defendant." *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981). Any good-faith attempt to present evidence can hardly be characterized as misconduct. However, a prosecutor may not, through repeated questioning or other innuendo, attempt to create the impression that the defense has tried to interfere improperly with prosecution witnesses, unless the prosecutor has a solid evidentiary foundation linking the defendant to such conduct. See *People v Long*, 144 Mich 585, 585-586; 108 NW 91 (1906); *People v Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985).

In this case, the prosecutor said in her opening statement, "I want you to pay special attention to the witnesses in this case . . . . You're going to hear about how this came out, how it was discovered. You're going to hear about efforts to influence witnesses in this case after it was discovered, and that's going to be really important." Defendant did not object.

While questioning the complainant's companion ("the witness") on the night in question, the prosecutor elicited that one of the other youths present at defendant's house had advised her how to testify. After a defense objection, the court excused the jury, heard additional testimony, then instructed the prosecutor not to pursue this line of questioning without a better foundation. Shortly after the jury returned, the prosecutor elicited from the witness that she had been less than truthful when talking to an investigator, because the complainant had indicated that she was going to say that it was all a dream, and the witness wanted to support that decision.

The prosecutor asked the witness to elaborate, the court overruled an (asked-and-answered) objection, and the witness said, "[L]ying is something that is totally different, but yet [defendant] just asked her to have some more sense in it." The exchange continued as follows:

> Q. Your statement a month ago was that [defendant] asked you to ask [the complainant] to lie, correct?
>
> A. Correct.
>
> Q. And that was it; is that correct?
>
> A. Correct.
>
> Q. You didn't say anything about him saying somebody should have sense, did you?
>
> A. No.

Q. And you didn't say anything about him saying any of the other things you said today?

A. No.

Q. He asked you to ask [the complainant] to lie?

A. No.

Q. That's—

A. I mean yes.

Q. What you told us, correct?

A. Yes.

Defense counsel again objected on the ground that the question had been asked and answered. The prosecutor argued, "[T]his is a pretty critical point and I think there's been a lot of efforts to influence testimony here." The court sustained the objection.

On direct examination of the complainant, the prosecutor elicited that the witness had tried to influence her testimony. When the prosecutor asked her to repeat what the witness had said, defense counsel raised a hearsay objection, to which the prosecutor responded, "[E]fforts to intimidate or affect a witness' testimony, and particularly where the witness has testified here, and the Court is -- and the jury is going to have to assess her credibility." The trial court excused the jury, and the prosecutor elicited from the complainant that the witness had "wanted me to, um, say that nothing ever happened." The prosecutor further elicited that the witness had indicated that she had talked with defendant about the complainant's testimony. The complainant went on to reiterate that the witness suggested that she say the whole thing was "a dream or something," and added, "I think it was her idea, but she also had other people telling her that they have to try to get me to lie and all this," those "others" included defendant. The court then elicited from the complainant that she knew that defendant had called the witness from jail, "[t]o try to get me to lie and talk some sense into me because he thought that I'd listen to her so that I could get him off." The witness further stated that defendant had not spoken to her directly, and that she attributed no specific proposed untruths to him.

The trial court ruled that the complainant's testimony alone did not establish a sufficient nexus between defendant and any witness tampering to allow that line of questioning. The record shows that the trial court greatly curtailed the prosecutor's efforts to inject the issue of possible witness tampering. Additionally, the witness' plain statements to the effect that defendant had asked her to ask the complainant to lie established a sufficient foundation for that line of questioning as concerned the witness. Further, although her efforts failed because of hearsay objections, the prosecutor demonstrated a good-faith basis for pursuing this same line of questioning with the complainant. We conclude that the prosecutor's pursuit of this line of questioning was not misconduct, and, in any event, a curative instruction, had defendant requested one, would have sufficiently dispelled any prejudice.

V. Ineffective Assistance of Counsel/ Scoring of Offense Variables

Defendant argues that defense counsel was ineffective at sentencing for failing to challenge the scoring of offense variable ("OV") 10 in connection with each of his convictions, and of OV 11 in connection with his CSC II conviction under the sentencing guidelines.[1] Generally, unpreserved scoring challenges are not subject to appellate review. MCR 6.429(C); MCL 769.34(10). However, because defendant framed his scoring challenges as claims of ineffective assistance of counsel, we will review the issue. *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

To establish a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance was objectively unreasonable, (2) but for counsel's actions the outcome of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id*.

Defendant asserts that defense counsel was ineffective for failing to challenge the ten points assessed for OV 10, concerning victim vulnerability, for both convictions. We disagree. Ten points are properly assessed where the offender exploited a victim's youth. MCL 777.40(1)(b). Defendant points out that MCL 777.40(2) states that the mere existence of one or more factors set forth in the preceding subsection does not automatically establish victim vulnerability, and argues that "[t]here is no evidence that defendant exploited a vulnerable victim, let alone exploited their disparity in age." We think it obvious that when a twenty-three-year-old man takes sexual liberties with a twelve-year-old girl, the former is exploiting the latter's youth. The selfish or unethical purposes of the older participant in such a case can hardly be questioned, MCL 777.40(3)(b), and the same may be said for a young adolescent's susceptibility to persuasion or temptation in connection with an adult who is eleven years her senior. Therefore, the score of ten points for OV 10 was appropriate and defense counsel was not ineffective for failing to challenge the score. Counsel is not obligated to make futile objections. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant's final challenge concerns defense counsel's failure to object to the assessment of twenty-five points under OV 11, concerning sexual penetrations, in connection with his CSC II conviction. We find that this offense variable was scored incorrectly; however, the error was harmless.

Twenty-five points are appropriate for OV 11 if one criminal sexual penetration occurred and zero points should be scored if there was no penetration. MCL 777.41(1). The instructions for OV 11 state, "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). In this instance, the sentencing offense was defendant's CSC II conviction, which relates to sexual *contact*. Thus, no penetration arose out of

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[1] Because the conduct for which defendant was convicted occurred after January 1, 1999, the legislative sentencing guidelines, enacted pursuant to MCL 769.34, were used to determine the recommended range of defendant's minimum sentence.

this offense. Further, even if we were to construe the penetration as arising out of the offense, there was evidence of only one digital penetration, which formed the basis for defendant's CSC I conviction. The instructions for OV 11 also state that points are not scored "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777,41(2)(c). Thus, the appropriate score was zero points.

However, the error was harmless because, in concurrent sentencing cases, where there are multiple convictions for a single offender, the trial court need only complete the sentencing guidelines for the conviction that carries the highest statutory maximum. Because the statutory maximum for CSC I (life) is higher than for CSC II (fifteen years), the trial court needed only to score and sentence defendant on the CSC I conviction. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). As this Court explained in *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997),

> If sentences are to be served concurrently, there is no reason why a defendant's offenses should be scored separately because all of the defendant's sentences will be served at the same time. The sentence for the most severe offense will encompass the sentences for any lesser offenses.

Defendant's sentence for his CSC II conviction runs concurrent to his sentence for his CSC I conviction, which in actuality renders the former sentence irrelevant. Thus, defense counsel was not ineffective for failing to challenge the OV 11 score.

VI. Judgment of Sentence

We note that although the second page of the judgment of sentence explicitly states that defendant's sentences are to run concurrent to each other (but consecutive to an unrelated criminal sentence), the marking of item five on the first page suggests that the sentences are to be served consecutively. The trial court's plain wording on the second page of the judgment of sentence, along with its statements on the record at sentencing, indicate that the implication on page one that consecutive sentencing was envisioned for these two sentences was inadvertent. Although the parties did not raise this issue, we nonetheless conclude that remand is appropriate to correct the judgment of sentence.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter